

## **Chapter 7**

### **Inspiration for children's human rights from indigenous peoples' rights**

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#### **1. Introduction**

Although there are many and obvious differences between children and indigenous peoples, there are also quite some similarities, especially in how international human rights law and academic research have addressed the claims of these groups. This chapter focuses on three domains in which children's rights and indigenous peoples' rights share certain challenges, in order to explore whether and how both branches of human rights law could inspire each other: (i) the demarcation of the personal scope of rights, and the divisions and dichotomies generated by the establishment of categorical human rights; (ii) the way in which indigenous peoples and children have been constructed, especially from a Western perspective, and the consequences thereof; and (iii) participation and consent. I will argue that children's rights law could draw inspiration from indigenous peoples' rights law in defining its rights holders, in developing the collective dimension of the right to be heard and in conceptualising the right of children to give consent. On the other hand, an area in which research and practice on both indigenous peoples' rights and children's rights should increase efforts, concerns addressing the adverse consequences of idealised constructions.

This chapter has developed in an organic way, following the flow of my professional life. In my PhD research, I analysed the rights of indigenous peoples and local communities in the context of nature conservation initiatives, with ethnographic fieldwork in the Peruvian Amazon.<sup>i</sup> After that, I delved into children's rights through my work at the Flemish Children's Rights Knowledge Centre.<sup>ii</sup> Working on both indigenous peoples' rights and children's rights, I have at times been struck by parallels in how these two groups have been approached in law and research. The notes and reflections on those parallels gathered over the years formed the backbone of this chapter.

#### **2. The personal scope of indigenous peoples' and children's rights law**

##### **a. The definitional tangle**

A first challenge that is common to indigenous peoples' rights law and children's rights law concerns the demarcation of their personal scope. Who can invoke the protection of these categorical forms of rights protection? And who has the power to decide this?

Definitions of 'indigenous peoples' in international law have evolved over time and differ in the elements they emphasise. The most influential definitions are those of Conventions No. 107 and – especially – No. 169 of the International Labour Organisation (ILO) as well as the one provided by Martínez Cobo in his "Study on the Problem of Discrimination against Indigenous Populations".<sup>iii</sup> No definition of indigenous peoples has been universally endorsed, however. Interestingly, the lack of a universally accepted definition has not prevented the global rise of the indigenous movement and the development of an extensive body of legislation, case law and doctrine concerning the rights of indigenous peoples.

Indigenous peoples themselves emphasise that a definition of 'indigenous peoples' is "not necessary or desirable," and stress the right of self-identification.<sup>iv</sup> Such a right of self-identification has two components: the right of an individual to identify him- or herself as indigenous, and the right of a group to define its membership. Of these two components, the former, the right of an individual to choose to belong to a particular people or 'to opt out', takes precedence over the latter.<sup>v</sup> Any other approach would unduly encroach upon individual liberty – a cornerstone of human rights law. Various reasons underpin the importance attached by indigenous peoples to self-identification. First, given the enormous diversity in the historical and current situation of indigenous peoples throughout the globe, any definition risks being underinclusive in certain contexts or overinclusive in others. Moreover, attributing definitional power to an external actor, such as a state or international organisation, would imply that the latter would also have the possibility *not* to recognise indigenous peoples.<sup>vi</sup> History is a powerful witness of the adverse consequences entailed by such a denial of the existence of indigenous peoples and their rights.

The Working Group on Indigenous Populations, which was established in 1982, followed this position of indigenous peoples, as it decided not to adopt a formal definition.<sup>vii</sup> This absence of a definition did not prevent the Working Group from acting efficiently and successfully. On the contrary, the Working Group has been praised for its openness and flexibility.<sup>viii</sup> The Committee on the Elimination of Racial Discrimination (CERD) has also stated that the identification as members of a particular racial or ethnic group shall be based upon self-identification, "if no justification exists to the contrary."<sup>ix</sup> The UN Declaration on the Rights

of Indigenous Peoples (UNDRIP) does not contain a definition of indigenous peoples either. Pursuant to Article 33, 1 UNDRIP, “[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.”

To resolve questions of indigenesness in concrete settings, various authors have proposed a flexible approach. Erica Daes, the former Chairperson-Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, has identified various “factors considered relevant to the concept of indigenous”, namely priority in time, the voluntary perpetuation of cultural distinctiveness, self-identification and recognition by other groups, and an experience of marginalisation.<sup>x</sup> She has stressed, however, that these factors “do not, and cannot, constitute an inclusive or comprehensive definition. Rather, they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts.”<sup>xi</sup> Similarly, in his ‘constructivist approach’, Kingsbury suggests to combine different criteria in a nuanced and flexible way.<sup>xii</sup> As such, he identifies four uncontested and indispensable characteristics of the concept of indigenous peoples: (i) self-identification as an ethnic group; (ii) historical experience of, or contingent vulnerability to, severe disruption, dislocation, or exploitation; (iii) long connection with the region; and (iv) the wish to retain a distinct identity. Three further criteria, namely (i) non-dominance in the state or region, (ii) close cultural affinity with a particular territory or land, and (iii) continuity based on historical priority, must be interpreted with some flexibility. Moreover, these latter criteria do not necessarily have to be present all three simultaneously, so as not to unjustly exclude certain groups from the qualification as indigenous peoples. Other additional indicators such as language and race are not essential, but may support the case in favour of qualification as an indigenous people. Sieder and Witchell have also pleaded for “flexible and dynamic conceptions” of indigenous peoples.<sup>xiii</sup> Finally, in response to the particular challenges relating to indigenesness on the African continent, the African Commission’s Working Group on Indigenous Populations/Communities has advanced a “modern analytic understanding” of the term indigenous, with three fundamental characteristics: (i) self-definition, (ii) cultural difference, most prominently expressed in the distinctive relationship of indigenous peoples to their ancestral territory and natural resources, and (iii) an experience of marginalisation and dispossession.<sup>xiv</sup> The criterion of priority in time would, in the eyes of the Working Group, not allow an adequate analysis of the continuing structural inequalities within African independent states.<sup>xv</sup>

Such flexible conceptions of indigenous peoples, with self-identification as a central element, take into account the specific characteristics of indigenous peoples, while leaving enough space for regional and local particularities. This approach seems more appropriate than establishing a ‘one-size-fits-all’ definition at the international level, which would fit uneasily with various local contexts.

In contrast with this rather open approach towards defining indigenous peoples, we know quite well who ‘children’ are – or at least we think we do. Article 1 of the quasi-universally ratified Convention on the Rights of the Child (CRC) reads: “*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”.<sup>xvi</sup> Even though Article 1 explicitly confines its scope to the CRC, this definition has been widely adopted in national, regional and international legal frameworks and policies on children.<sup>xvii</sup> The consensus to apply children’s rights to persons below the age of eighteen years is thus very broad, especially when compared to the heated debates on the definition of indigenous peoples. Such a univocal definition of children obviously has its advantages, among which simplicity, clarity, a global common understanding of children, and the facilitation of cooperation between different jurisdictions.

This wide endorsement of the CRC definition does not mean that there is no debate regarding the starting point of children’s rights, namely its application to the unborn child,<sup>xviii</sup> or the upper age limit of the definition of children. With respect to the latter, findings in neuroscience that the brain continues to develop until the age of 25 have generated calls to extend the scope of children’s rights up to that age.<sup>xix</sup> As discussed in the next subsection, a more flexible approach towards the boundary between ‘children’ and ‘youth’ may be warranted. Moreover, children are not a homogeneous group, but grow up in very diverse geographical, cultural and socio-economic contexts. Establishing a general cut-off age at eighteen years to define children appears to be quite a Eurocentric approach. In non-Western contexts, other factors besides chronological age also play a role in establishing the boundary between childhood and adulthood. Examples include the concept of maturity in Muslim legal tradition,<sup>xx</sup> ‘possessing understanding’ in Bangladesh,<sup>xxi</sup> and having productive and reproductive capacities in Southern and Eastern Africa.<sup>xxii</sup> Children in Africa are often more autonomous and independent at an earlier age than those growing up in a nuclear Western family, but they are also more accountable to their communities.<sup>xxiii</sup> Denying children certain

rights, such as a right to work in dignity,<sup>xxiv</sup> because of their formal status of children may then go against their best interests.

Does the indigenous rights regime provide inspiration to address these challenges concerning the demarcation of the personal scope of children's rights law? In line with the complex and flexible approaches towards defining indigenous peoples, this chapter suggests moving towards a multidimensional understanding of children, which does not exclusively focus on chronological age.<sup>xxv</sup> When thinking about children's rights and to whom to apply them, importance should also be attached to other elements than the number of years one has been walking around on this globe. First, in line with the right of self-identification of indigenous peoples, more attention should be paid to how children perceive themselves. Not giving children a say in determining who can invoke children's rights seems to be a continuation of the paternalistic and protectionist approach that predominated the early children's rights movement, and goes against children's right to express their views in matters affecting them and to have these views given due weight (Article 12 CRC).

Second, other factors than chronological age may be relevant in determining the scope of children's rights law, such as socio-psychological development, the role taken up in one's family, community and society, as well as the cultural, socio-economic, historical and geographical context. The relevance of psychological development in the application of children's rights law is already reflected in the concepts of 'maturity', as co-determining the impact of children's expressed views (Article 12 CRC), and 'evolving capacities', as delineating the scope of the duty of parents and legal guardians to provide guidance to the child (Articles 5 and 14 CRC). The identification of the particular characteristics to be taken into account in defining the personal scope of children's rights law in a certain context should then occur at the appropriate international, regional, national or local level.

The proposal of a multidimensional approach towards defining children, i.e. going beyond chronological age to take into account self-identification as well as psychological and contextual factors, should not be understood as implying or suggesting lowering the standard of children's rights law. On the contrary, a more flexible and contextualised approach towards defining children may lead to a more tailored and thus more adequate realisation of human and children's rights. The experience of indigenous peoples has shown that a definitional approach combining various criteria in a flexible and nuanced way, may not be as problematic as one may think at first sight. For instance, one could think of a situation where a teenager

does not consider herself as a child anymore (self-identification), has the corresponding socio-psychological capabilities, and is taking up adult duties within her family and community. In these circumstances, the rights of this teenager may be better protected by not considering her as a child, but by ensuring the realisation of her (general) human rights.

### **b. Creating dichotomies... and building some bridges?**

During the last decades, categorical rights have been created within human rights law to rectify historical situations of substantive inequality, discrimination and marginalisation of certain groups (e.g. women, children, indigenous peoples, migrant workers and persons with disabilities).<sup>xxvi</sup> It was considered that the general human rights instruments did not adequately recognise and protect the specific needs and rights of these groups. Nevertheless, such categorical rights inevitably generate divisions between those who belong to a certain category and those who do not. Groups just over the edge, who cannot invoke the protection of a particular categorical rights regime, may then be among the first ones to fall through the cracks of the human rights system.

As indigenous peoples are concerned, this may be particularly the case for local (peasant) communities.<sup>xxvii</sup> Historically as well as today, indigenous peoples have suffered from disdain, discrimination and human rights violations. Nowadays, however, a stronger international legal framework has turned indigenusness into a potentially 'positive' factor, as the indigenous identity comes with greater land and resource rights as well as more autonomy. Indigenous peoples may also more easily attract funding from international donors, as they are more 'exotic' and thus appealing than the 'grey' peasant communities next-door. So whereas before, 'nobody wanted to be indigenous anymore',<sup>xxviii</sup> today the pendulum seems to a certain extent have swung to the other side, and this to the detriment of the recognition of and respect for the rights of local non-indigenous communities. As a consequence, national minorities are increasingly redefining themselves as indigenous peoples, to gain access to this broader catalogue of rights to autonomy, land and legal pluralism.<sup>xxix</sup>

The recognition of broader territorial, land and resource rights as well as greater participation rights of indigenous peoples may be particularly problematic for communities that share many characteristics that are usually associated with indigenous peoples – such as a close

connection with the land – but that do not qualify as ‘indigenous peoples’.<sup>xxx</sup> In Latin America, this is for instance the case for Afrodescendant maroon communities, whose ancestors escaped from slavery to establish their own communities: “These Afrodescendant groups developed separate racial/cultural collective identities distinct from those of the dominant *mestizo* majority, and forged a relationship to land or territory in the colonial period before the establishment of state sovereignty of the areas they occupied.”<sup>xxxix</sup> In recent years, the boundaries between the rights of indigenous peoples and these Afrodescendant maroon communities have become blurred. For instance, the Inter-American Court of Human Rights has extended its jurisprudence on collective property rights of indigenous peoples to the Afrodescendant maroon communities in two cases against Suriname.<sup>xxxii</sup>

Similarly, the establishment of children’s rights divides the human population in children on the one hand, and adults – such as parents and teachers – on the other. Children’s rights also separate children from ‘young adults’. Because of the cut-off age of eighteen, these young adults lose the protection of children’s rights law, even though the life of a nineteen-year-old may not be so different from that of a seventeen-year-old, and some nineteen-year-olds may find themselves in a more vulnerable situation than some seventeen-year-olds. Just as the Inter-American human rights jurisprudence has recognised the communal land rights of Afrodescendant maroon communities to the image of the land rights of indigenous peoples, it seems relevant to build more bridges between the rights of children and those of young adults. This is already being done in various situations. For example, the UN Guidelines for the Alternative Care of Children are not only applicable to children, but also, as appropriate, to “young persons already in alternative care and who need continuing care or support for a transitional period after reaching the age of majority under applicable law”.<sup>xxxiii</sup> This provision prevents a rupture in care during the – often complex – transition to adulthood. In Flanders, a child and youth impact report (JoKER) must be elaborated for draft decrees that have a direct impact on the interests of persons under the age of 25.<sup>xxxiv</sup> Both minors and young adults are thus included in its personal field of application, although another cut-off age (namely 25 years) is established.

It is concluded that within both indigenous peoples’ rights law and children’s rights law, steps are being taken to mitigate some of the potentially undesirable consequences of categorical rights systems, by extending part of their protection to those who just fall outside their personal scope. From a general human rights perspective, this evolution is to be applauded

and should continue where appropriate, so as to avoid that categorical protection creates new vulnerabilities.

### 3. Western constructions

A second domain characterised by some remarkable parallels, concerns the way in which children and indigenous peoples have been represented and constructed in Western society, not only in popular discourse but also in scholarship. A multiplicity of child images and constructions of indigenusness can be identified and situated on a continuum ranging from (overly) 'negative' to (overly) 'positive' appreciations. Different and even opposite images are often simultaneously present in a certain context, their strength depending on the particular intersection of time, place and actors involved. Within the confines of this chapter, it is not possible to do justice to the richness of analysis in historiographies on the constructions of childhood and indigenusness.<sup>xxxv</sup> Nevertheless, from an analytical perspective, some parallels between constructions of indigenous peoples and constructions of children may be identified, especially at both extremities of the continuum.

Historically, particularly during colonial times, indigenous peoples were often considered 'primitive' and 'backward', they needed to be civilised and proselytised. Such constructions underpinned the doctrines of *terra nullius* and guardianship.<sup>xxxvi</sup> Similarly, in Western society, children were long seen as the private property of their fathers, or as 'not-yet' human beings.<sup>xxxvii</sup> Both groups were marginalised in society: they were not considered fully, nor was their specificity acknowledged.

Since then, an enormous shift in the perception of and approach towards indigenous peoples and children is noticeable, to the extent that today, both groups are often romanticised and idealised. Indigenous peoples have been represented as the guardians and stewards of Mother Earth, living in harmony with nature. The Romantic image of Indians as noble savages, expressed in the writings of Locke and Rousseau, was taken up again in the twentieth century to refer to the supposedly balanced relationship of indigenous peoples with their natural environment. The 'ecologically noble savage' was born; indigenous peoples were seen as 'natural conservationists'.<sup>xxxviii</sup> Likewise, the attitudes towards children changed tremendously. Zelizer, for instance, has argued that from the late nineteenth century onwards,



childhood underwent a process of ‘sacralisation’ in America: children were not only invested with emotional significance, they were also separated from their economic value – rendering them ‘priceless’.<sup>xxxix</sup>

At the other far end of the continuum, less benign images of indigenous peoples and children can be discerned. Some Western conservationists, for instance, argue that nature conservation requires strict preservation, which is not reconcilable with human presence or resource use.<sup>xi</sup> They claim that sustainable resource use cannot sufficiently protect biodiversity, and point to instances of environmental destruction by indigenous peoples. This perception of fundamental incompatibility between humankind and nature is rooted in and still influenced by the American idea of wilderness preservation as it developed in the nineteenth century.<sup>xli</sup> Comparably, children that do not conform to the image of innocent angels tend to be set away as dangerous. A shift is being observed from welfare-oriented approaches for children ‘*at risk*’ towards perceiving children ‘*as risk*’, leading to the image of the ‘problem child’. The behaviour of children and young people is today increasingly problematised – and often criminalised –, especially in the public space.<sup>xlii</sup>

Particularly interesting for the purposes of this chapter is that the image of both children and indigenous peoples has been used to characterise and essentialise the ‘other’ category. As such, “[o]ne of the most common observations in literature about colonial relations has been that indigenous populations are invariably cast as childlike in their nature”.<sup>xliii</sup> Such infantilisation of native populations was used by the colonisers to legitimate paternalistic policies and the exploitation of native economies.<sup>xliv</sup> Similarly, children have been constructed as either ‘primitives’ or ‘noble savages’. For instance, Gagen has argued that “US colonial policy did not simply construct the natives of the Philippines, Puerto Rico or Guam as primitive, but western child development theories themselves constructed the American child as inherently primitive”.<sup>xlv</sup> From such an evolutionary perspective, children were situated in a prehistorical phase of development and needed to evolve towards modernity, like America’s ‘underdeveloped’ colonies. Jenks has referred to this image of the child as being primitive and wild as the Dionysian child.<sup>xlvi</sup> By contrast, when considering children as intrinsically good, they have been portrayed as ‘noble savages’; Jenks invoking here the mythological image of the Apollonian child.<sup>xlvii</sup>

Many of the constructions of indigenous peoples and children referred to above, are linked to the presumed ‘natural’ character of these groups, which may be assessed positively (‘noble savage’) or negatively (‘wild and primitive’). These images stand in opposition to the ‘civilised’ Western world in general or adults in particular. The new sociology of childhood has tried to break through this binary construct of natural children versus civilised adults.<sup>xlvi</sup> Also in indigenous rights studies, the environmental harmony image has been deconstructed.<sup>xlix</sup>

What are consequences of these constructions of indigeness and childhood? In general, such constructions seem problematic, because they violate the competence of the group members and “their right to be valued on their own terms”.<sup>1</sup> Although ‘negative’ images have not disappeared, it seems that today idealised constructions of indigenous peoples and children predominate in Western society, often coupled with sentimentalism. Both groups arouse quite strong emotions with the ‘other’ (Western society or adults), who feels a need to ‘preserve’ or ‘protect’ them respectively. Therefore, I discuss hereinafter two shared consequences of romanticised constructions of indigenous peoples and children, namely an adverse impact on rights protection and a lack of critical scientific analysis.

First, if romantic images of indigenous peoples as guardians of Mother Earth and of children as inherently good turn out not to be supported by reality, this may have detrimental consequences for the recognition of and respect for the rights of these groups. For instance, the assumption of a harmonious relationship of indigenous peoples with nature has had the contradictory consequence that higher expectations have been attached to the attitudes and actions of these peoples toward the environment. The ecological footprint of an average conservationist residing in an industrial country is usually much larger than the one of an indigenous person.<sup>li</sup> Nevertheless, when practices of the latter are unfriendly to the environment, conservationists are very indignant. As Cronon has formulated it: “Why in the debates about pristine natural areas are “primitive” peoples idealized, even sentimentalized, until the moment they do something unprimitive, modern, and unnatural, and thereby fall from environmental grace?”<sup>lii</sup> These unrealistic standards regarding the conservationist behaviour of indigenous peoples have had a negative impact on the potential to realise indigenous peoples’ rights. In the words of Niezen: “[t]he high – or one may say impossible – expectations of environmental stewardship applied to indigenous peoples have a tendency to intrude upon their rights and thus their ability to prosper.”<sup>liii</sup> The rights of indigenous peoples

do not depend on their conservationist behaviour though. Likewise, children who do not behave as responsible citizens but become ‘a problem’, may be deprived of the specific protection of the children’s rights regime. For example, Belgian minors who are sixteen years or older when they commit a criminal offence, can be referred to the criminal law system if the youth judge is of the opinion, on the basis of a societal and medical-psychological examination, that the minor is not ‘suitable’ for youth protection measures.<sup>liv</sup> The only criterion that can be taken into account is the subjective one of the personality of the minor. Similar systems in Europe exist in the Netherlands (also from the age of sixteen) and England and Wales (from the age of ten). However, in England and Wales, the judge can only decide to refer to the criminal law system on the basis of objective elements, such as the characteristics and seriousness of the criminal offence, or having an accomplice of age. In the Netherlands, a referral can be based on either subjective elements (related to the personality of the offender) or objective elements (related to the criminal offence).<sup>lv</sup> Notwithstanding the particularities of each system, they have in common that children who commit an offence may be referred from the juvenile justice system to the adult criminal law system.

Second, idealised constructions may limit the possibility to adopt a critical perspective in research, a dynamic that seems to be at play in research on both indigenous peoples’ rights and children’s rights. For instance, according to Smith – a well-known anthropologist in Peru –, one of the reasons explaining the absence of much critical research on the process of political organisation in the Amazon region is the attitude prevailing in the small academic and NGO world accompanying the indigenous movement, “an attitude that combines romanticism with a feeling of guilt towards the indigenous, which hampers a critical and objective examination of indigenous political actions”.<sup>lvi</sup> By the same token, the image of children as being vulnerable, innocent and intrinsically good may contribute to an understanding of children’s rights as being ‘intrinsically good’ for children as well. Combined with the observation that much work remains to be done as regards the implementation of children’s rights, it is then often considered ‘not done’ to examine children’s rights from a critical perspective – be it with the aim of contributing to a more effective realisation of children’s rights.<sup>lvii</sup>

By way of conclusion, is there then something to be ‘learnt’ in this domain of constructions and representations from (research on) indigenous peoples’ rights for (research on) children’s rights? In my opinion, both fields should increase efforts to unveil assumptions and

constructions that essentialise indigenous peoples and children, as well as the impact of these constructions on research, policy and practice. Such essentialising tendencies do not account for the multiple and complex layers of identity within every person and each group, and may have a negative impact on rights protection.

#### **4. Participation and consent**

Parallels between indigenous peoples' rights and children's rights may also be drawn in the domain of participation. In an effort to move away from assimilationist policies (toward indigenous peoples) and protectionist approaches (toward children), participation rights have taken on particular importance for both groups. Moreover, these rights have been conceptually developed in ways tailored to the specificities of indigenous peoples and children. Next to a general right to participation of indigenous peoples to at least the same extent as other sectors of the population,<sup>lviii</sup> this has implied the establishment of a specific right of indigenous peoples to free, prior and informed consultation "whenever consideration is given to legislative or administrative measures which may affect them directly" (Article 6(1)(a) ILO Convention 169).<sup>lix</sup> Moreover, the right to free, prior and informed *consent* of indigenous peoples is being increasingly recognised, as elaborated below. Children on the other hand, have the right to express their views freely on all matters affecting them, and to these views being given due account in accordance with their age and maturity (Article 12 CRC) – which has been in brief referred to as "the right to be heard".<sup>lx</sup>

In the area of participation, consultation and consent, I suggest that indigenous peoples' rights law could inspire children's rights law as regards two aspects: the further theoretical, legal and practical development of the collective dimension of the right of children to be heard, and the fleshing out of the attributes of the emerging right of children to consent (namely free, prior and informed). This section starts with a brief comparison between the two key provisions on participation in both fields of law, and closes with the identification of some common challenges in the realisation of the participation rights of indigenous peoples and children.

Comparing Article 6 ILO Convention 169 and Article 12 CRC leads to the following observations. As the material scope is concerned, governments should consult indigenous peoples "on legislative or administrative measures", whereas the right of children to be heard

broadly applies to “all matters”. The link between the matter and the right holder triggering the right is also formulated widely in the CRC (matters “affecting the child”). ILO Convention 169 requires a direct impact of the envisaged measure on indigenous peoples,<sup>lxi</sup> but explicitly accounts for the uncertain nature of such impact (measures “which *may* affect them directly”).<sup>lxii</sup> The possible influence on the eventual decision is similar: neither the right to consultation nor the right to be heard imply a veto power. Consultation of indigenous peoples should be carried out “with the objective of achieving agreement or consent to the proposed measures”, but an absence of agreement does not invalidate the consultation.<sup>lxiii</sup> The views of children “are to be given due weight in accordance with the age and maturity of the child”, providing the decision-maker some leeway. Whereas the CRC does not offer further guidance on the modalities or quality criteria that should characterise the participation process, consultation of indigenous peoples should take place “through appropriate procedures and in particular through their representative institutions” (Article 6(1)(a) ILO Convention 169). Moreover, consultation must be undertaken “in good faith and in a form appropriate to the circumstances” (Article 6(2) ILO Convention 169). A final difference is that the right to consultation is a collective right of indigenous peoples (as evident from the ‘representative institutions’ requirement), whereas the right of the child to be heard is both an individual and a collective right.

In General Comment No. 12, the Committee on the Rights of the Child explicitly makes a distinction between “the right to be heard of an individual child and the right to be heard as applied to a group of children (e.g. a class of schoolchildren, the children in a neighbourhood, the children of a country, children with disabilities, or girls)”.<sup>lxiv</sup> It argues that this is a relevant distinction, because “the task of assessing a child’s age and maturity ... is made more difficult when children express themselves collectively”.<sup>lxv</sup> The Committee continues to emphasise that “[e]ven when confronting difficulties in assessing age and maturity, States parties should consider children as a group to be heard, and the Committee strongly recommends that States parties exert all efforts to listen to or seek the views of those children speaking collectively”.<sup>lxvi</sup> The Committee then announces that

[i]n section A (Legal analysis) of the general comment, the Committee deals with the right to be heard of the *individual child*. In section C (The implementation of the right to be heard in different settings and situations), the Committee considers the right to be heard of both the *individual child* and *children as a group*.<sup>lxvii</sup>

The Committee does not provide any explanation or justification for this different approach of the right to be heard of the individual child and of children as a group. The absence of a legal analysis of the right to be heard of children as a group seems a missed opportunity. Moreover, in the implementation section, the Committee does not clearly distinguish between the individual and group right to be heard. To further develop the collective dimension of children's right to be heard, some lessons may be learnt from the experience built up regarding the consultation of indigenous peoples, for instance with regard to representativity. The functioning of indigenous organisations at the local, national, regional and international level has shown the challenges in ensuring that indigenous leaders at a higher level are still voicing the concerns of those they claim to represent. Maintaining open channels of communication and guaranteeing accountability are two ways in which these challenges can be mitigated.

A related area of possible inspiration concerns the right to give consent. Indigenous peoples have the right to free, prior and informed consent in case of relocation (Article 16(2) ILO Convention 169; Article 10 UNDRIP) and the storage or disposal of hazardous materials in indigenous lands or territories (Article 29(2) UNDRIP).<sup>lxviii</sup> According to the Inter-American human rights jurisprudence, free, prior and informed consent is also required when “large-scale development or investment projects ... would have a major impact” on the territory of the people concerned.<sup>lxix</sup> The Committee on the Elimination of Racial Discrimination has broadly stated that member states should ensure that “no decisions directly relating to the rights and interests [of indigenous peoples] are taken without their informed consent.”<sup>lxx</sup> Other UN human rights treaty bodies have also referred to the norm of free, prior and informed consent in relation to indigenous peoples, mostly in the context of resource extraction activities.<sup>lxxi</sup> Indigenous peoples themselves insist on the recognition of a wide right “to veto any developments proposed on our lands without our consent”.<sup>lxxii</sup>

The CRC does not give children a right to consent. In General Comment No. 12, however, the right of a child to give consent is mentioned a few times. First, child offenders must give their “free and voluntary consent” in case of diversion, and “must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed”, the latter requirement thus ensuring an informed consent.<sup>lxxiii</sup> In health care, “[t]he Committee welcomes the introduction in some countries of a fixed age at which the right to consent transfers to the child, and encourages States parties to

give consideration to the introduction of such legislation.”<sup>lxxiv</sup> Moreover, the “informed consent” of children must be obtained concerning their participation in paediatric research and clinical trials.<sup>lxxv</sup> The elements of ‘free’ and ‘prior’ are not mentioned here. In line with the recognition of children as legal subjects and agentic actors, it seems relevant to rethink more broadly under which circumstances children should not only have a right to be heard, but a right to give consent as well. In the conceptualisation of this right to consent and its attributes, inspiration could be drawn from how the elements of ‘free’, ‘prior’ and ‘informed’ have been developed in the legal framework, jurisprudence and literature on indigenous peoples’ rights to consultation and consent.<sup>lxxvi</sup> More specifically, clear and accurate information must be provided in a language and format comprehensible for the target group (for instance, in indigenous peoples’ mother tongue and in child-friendly terms respectively). The information must be available sufficiently beforehand so that there is time to process and discuss the information internally, before engaging in the actual consultation process (‘informed’). This consultation must be held before the decision is taken (‘prior’) and without exercising unduly pressure (‘free’).

Finally, indigenous peoples and children face some common challenges regarding participation. To start, unequal power relationships usually exist in the outward relationship: between indigenous peoples, an individual child or a group of children, on the one hand, and those that seek their opinion or listen to them, normally state representatives, on the other. When a *group* of indigenous peoples or children is consulted or being heard, power dynamics may also play internally. Subaltern or weaker voices risk receiving less attention. Persons that unite various markers of identity that are more prone to give rise to discrimination (such as gender, disability, ethnic origin, sexual orientation etc.), often experience more difficulties to have their voice heard. These challenges in relation to power dynamics are shared by other groups as well though.

Other participatory challenges seem more particular for indigenous peoples and children. Because their ways of thinking and behaving tend to differ from those of Western society and adults respectively, indigenous peoples and children are usually perceived as difficult-to-reach target groups. As a consequence, participation is often reduced to a mere presence at meetings, without sufficient efforts being made to really listen and try to understand their views.<sup>lxxvii</sup> Moreover, indigenous peoples and children share the challenge of avoiding tokenism.<sup>lxxviii</sup> Both groups have been put on the stage of international events, for instance at

the United Nations, but – especially in earlier decades – unfortunately often more as an exotic ‘bonus’ than as real stakeholders to be reckoned with. Summing up, for both indigenous peoples and children, the right to have their views being considered has developed in particular ways, as the ‘right to consultation’ and ‘the right to be heard’ respectively. When expanding the collective dimension of the right to be heard of children as a group, some of the lessons learnt in indigenous peoples’ rights law could be drawn upon. Also the more advanced conceptual development of the right to free, prior and informed consent in indigenous peoples’ rights law could inspire children’s rights law.

## 5. Conclusion

This chapter reflected on whether and how indigenous peoples’ rights law could inspire children’s rights law. A careful infusion of the flexible and contextual approach used to define indigenous peoples was suggested, in this way going beyond the criterion of chronological age when thinking about the personal scope of children’s rights law. Moreover, children’s rights law could benefit from the conceptual advances within indigenous peoples’ rights law to strengthen the collective right of children to be heard as a group, and to develop the right to free, prior and informed consent of children. A domain in which both (research on) children’s rights law and indigenous peoples’ rights law should increase efforts, concerns addressing the adverse consequences of idealised constructions.

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<sup>i</sup> See E Desmet, *Indigenous rights entwined with nature conservation* (Intersentia 2011).

<sup>ii</sup> Children’s Rights Knowledge Centre, <[www.keki.be](http://www.keki.be)>.

<sup>iii</sup> UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Study of the Problem of Discrimination against Indigenous Populations [J R Martínez Cobo, Special Rapporteur]’ E/CN.4/Sub.2/1986/7/Add.4 paras 379-381.

<sup>iv</sup> UN Commission on Human Rights, ‘Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the concept of “indigenous people”’ UN Doc E/CN.4/Sub.2/AC.4/1996/2 para 35.



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<sup>v</sup> See N Rouland, S Pierré-Caps and J Poumarède, *Droit des minorités et des peuples autochtones* (Presses Universitaires de France 1996), 442-443.

<sup>vi</sup> See F Mackay, *Los Derechos de Los Pueblos Indígenas En El Sistema Internacional* (Asociación Pro Derechos Humanos and Federación Internacional de Derechos Humanos 1999), 74-75.

<sup>vii</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report of the Working Group on Indigenous Populations on its Second Session' UN Doc E/CN.4/sub.2/1983/22, 22-23. See also Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80 *The American Journal of International Law* 369, 373-376.

<sup>viii</sup> See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples' UN Doc E/CN.4/Sub.2/AC.4/1995/3, 3. See also H Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1992) 91.

<sup>ix</sup> UN Committee on the Elimination of Racial Discrimination, 'General recommendation No. 8: Interpretation and application of article 1(1) and (4) (identification with a particular racial or ethnic group)' UN Doc A/45/18 (1990), preamble.

<sup>x</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the concept of "indigenous people"', UN Doc E/CN.4/SUB.2/AC.4/1996/2 para 69.

<sup>xi</sup> *ibid* para 70.

<sup>xii</sup> B Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *The American Journal of International Law* 414, 453-455.

<sup>xiii</sup> R Sieder and J Witchell, 'Advancing indigenous claims through the law: reflections on the Guatemalan peace process' in J K Cowan, M-B Dembour and R A Wilson (eds), *Culture and Rights Anthropological Perspectives* (Cambridge University Press 2001).

<sup>xiv</sup> African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (ACHPR and IWGIA 2005), 92-93.

<sup>xv</sup> *ibid* 92.

<sup>xvi</sup> Emphasis added.

<sup>xvii</sup> At the regional level, Article 2 of the African Charter on the Rights and Welfare of the Child states: "A child means every human being below the age of 18 years." The children's rights policies of the European Union, the Council of Europe and the United Nations also adopt the CRC definition. See E Desmet, 'Implementing the Convention on the Rights of the Child for 'youth': who and how?' (2012) 20 *The International Journal Of Children's Rights* 3, 10.

<sup>xviii</sup> See, eg, M Cornock and H Montgomery, 'Children's rights in and out of the womb' (2011) 19 *The International Journal Of Children's Rights* 3; R Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff 2009).

<sup>xix</sup> See, eg, P E Veerman, 'The Ageing of the UN Convention on the Rights of the Child' (2010) 18 *The International Journal of Children's Rights* 585.

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<sup>xx</sup> See K Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation' (2007) 29 Human Rights Quarterly 194, 199.

<sup>xxi</sup> See C Banks, 'The Discourse of Children's Rights in Bangladesh: International Norms and Local Definitions' (2007) 15 The International Journal of Children's Rights 391; S C White, 'Children's Rights and the Imagination of Community in Bangladesh' (2007) 14 Childhood 505.

<sup>xxii</sup> See A Armstrong and others, 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) 3 The International Journal of Children's Rights 333.

<sup>xxiii</sup> See Whiting and Whiting (1975), referred to in K Cheney, 'Killing them softly? Using children's rights to empower Africa's orphans and vulnerable children' (2012) 56 International Social Work 92, 98.

<sup>xxiv</sup> See K Hanson, D Volonakis and M Al-Rozzi, 'Child labour, working children and children's rights' in Wouter Vandenhoe and others (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015).

<sup>xxv</sup> A parallel could be drawn with the evolution in anti-poverty policies from a purely economic approach to poverty (as lack of income) towards a multidimensional understanding of poverty.

<sup>xxvi</sup> In addition, 'thematic' conventions have been adopted to protect *everyone* (not just a particular category of persons) against – at the United Nations level – racial discrimination, torture and enforced disappearances.

<sup>xxvii</sup> See F von Benda-Beckmann, 'Citizens, strangers and indigenous peoples: conceptual politics and legal pluralism' in R Kuppe and R Potz (eds), *Law & Anthropology: International Yearbook for Legal Anthropology*, vol 9 (Martinus Nijhoff Publishers 1997).

<sup>xxviii</sup> As a man from indigenous origin told me during my fieldwork in the Peruvian Amazon ("*Nadie quiere ser indígena ya*").

<sup>xxix</sup> See W Kymlicka, 'The internationalization of minority rights' (2008) 6 International Journal of Constitutional Law 1.

<sup>xxx</sup> See further E Desmet, 'Identifying Rights-Holders in Natural Resource Regimes: A Critical Assessment of the Peruvian Protected Areas Legislation' (2016) 8 The Hague Journal on the Rule of Law 135.

<sup>xxxi</sup> See J Hooker, 'Afro-descendant Struggles for Collective Rights in Latin America: Between Race and Culture' (2008) 10 Souls: A Critical Journal of Black Politics, Culture and Society 279, 285. Hooker distinguishes between four types of Latin American Afro-descendants: (i) *Afro-mestizos*, descendants of slaves who did not develop a separate racial/cultural group identity; (ii) descendants of slaves who developed a strong racial group identity, such as the *movimento negro* in Brazil; (iii) descendants of 'maroon' communities, such as the Quilombos in Brazil, Creoles in Nicaragua and Garifuna in Honduras, Nicaragua and Guatemala; and, in Central America, (iv) descendants of West Indian immigrant laborers.

<sup>xxxii</sup> See IACtHR, *Moiwana v Suriname*, Ser C, no 124 (15 June 2005) and IACtHR, *Saramaka v Suriname*, Ser C, no 172 (28 November 2007).

<sup>xxxiii</sup> UN General Assembly, 'Guidelines for the Alternative Care of Children' UN Doc A/RES/64/142 (2009), para 28.

<sup>xxxiv</sup> See E Desmet, H Op de Beeck and W Vandenhoe, 'Walking a tightrope. Evaluating the Child and Youth Impact Report in Flanders' (2015) 23 The International Journal Of Children's Rights 78.

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<sup>xxxv</sup> See, eg, H Cunningham, *Children and Childhood in Western Society Since 1500* (2nd edn, Pearson Education Limited 2005); J Dahl, *The Indigenous Space and Marginalized Peoples in the United Nations* (Palgrave Macmillan 2012).

<sup>xxxvi</sup> See P Thornberry, *Indigenous peoples and human rights* (Manchester University Press 2002) 74.

<sup>xxxvii</sup> See E Verhellen, 'The Convention on the Rights of the Child. Reflections from a historical, social policy and educational perspective' in W Vandenhole and others (eds) (n 24) 44.

<sup>xxxviii</sup> See K H Redford, 'The Ecologically Noble Savage' (1991) 15 *Cultural Survival Quarterly*.

<sup>xxxix</sup> V A Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* (Princeton University Press 1994).

<sup>xl</sup> See, eg, R Kramer, C van Schaik and J Johnson, *Last Stand: Protected Areas and the Defense of Tropical Biodiversity* (Oxford University Press 1997); J Terborgh, *Requiem for Nature* (1 edn, Island Press 2004).

<sup>xli</sup> See, eg, R Nash, *Wilderness and the American Mind* (4 edn, Yale University Press 2001).

<sup>xlii</sup> See S Pleysier, 'Kind als gevaar. De nieuwe preventie en criminalisering van gedrag' (2012) *Tijdschrift voor Jeugd en Kinderrechten* 278.

<sup>xliii</sup> See E A Gagen, 'Reflections of Primitivism: Development, Progress and Civilization in Imperial America, 1898–1914' (2007) 5 *Children's Geographies* 15, 18.

<sup>xliv</sup> *ibid.*

<sup>xlvi</sup> *ibid.*

<sup>xlvi</sup> C Jenks, *Childhood* (Routledge 2005) 62.

<sup>xlvi</sup> *ibid.*, 64.

<sup>xlvi</sup> See, eg, A James and A Prout, *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (Psychology Press 1997).

<sup>xlix</sup> See, eg, K von Benda-Beckmann, 'The Environmental Protection and Human Rights of Indigenous Peoples: A Tricky Alliance' 9 *Law and Anthropology* 302; E Alden Smith and M Wishnie, 'Conservation and Subsistence in Small-Scale Societies' 29 *Annual Review of Anthropology* 493.

<sup>i</sup> See Gagen, 17 drawing on Aitken (2001), in relation to children.

<sup>li</sup> See J W Clay, 'Cultural Survival and Conservation: Lessons from the Past Twenty Years' in M L Oldfield and J B Alcorn (eds), *Biodiversity: Culture, Conservation, and Ecodevelopment* (Westview Press 1991) 248.

<sup>lii</sup> W Cronon, 'The Trouble with Wilderness; or, Getting Back to the Wrong Nature' in W Cronon (ed), *Uncommon Ground: Rethinking the Human Place in Nature* (W W Norton & Company 1996), 85.

<sup>liii</sup> R Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press 2003), 182.

<sup>liv</sup> See A Nuytiens, J Christiaens and C Eliaerts, *Ernstige jeugddelinquenten gestraft? Praktijk van de uithandengeving* (Academia Press 2005).

<sup>lv</sup> *ibid.* 50. Moreover, in the Netherlands, a young person is still tried before the youth court, be it on the basis of the adult criminal code. *ibid.* 49.

<sup>lvi</sup> The other reasons he identified were: (i) the reluctance of indigenous organisations to being critically evaluated, which complicates access by outsiders like researchers or journalists; (ii) the fragile trust between the indigenous movement and non-indigenous persons, as a consequence of which few persons dare to endanger their relationship with the movement by publishing critical analyses; and (iii) the fact that the indigenous

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political movement was long not considered an appropriate topic of academic research, so few resources were available to do so. R Chase Smith, 'Los Indígenas Amazónicos Suben al Escenario Internacional: Reflexiones sobre el Accidentado Camino Recorrido' in F Morin and R Santana (eds), *Lo Transnacional: Instrumento y Desafío para los Pueblos Indígenas* (Abya-Yala 2002) 207.

<sup>lvii</sup> But see, eg, W Vandenhoe and others (eds) (n 27), adopting an approach of critique in the study of children's rights.

<sup>lviii</sup> See Article 6(1)(b) ILO Convention 169 and Article 18 UNDRIP.

<sup>lix</sup> See J S Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 154.

<sup>lx</sup> See, eg, CRC Committee, 'General Comment No 12: The right of the child to be heard' (2009), UN Doc CRC/C/GC/12.

<sup>lxi</sup> But see Article 19 UNDRIP where 'directly' has disappeared from the formulation.

<sup>lxii</sup> Emphasis added.

<sup>lxiii</sup> See R L Barsh, 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' (1990) 15 Oklahoma City University Law Review 209, 219.

<sup>lxiv</sup> CRC Committee, 'General Comment No. 12' (n 60), para 9.

<sup>lxv</sup> Such assessment may be facilitated when the group in question "is a component of an enduring structure, such as a family, a class of schoolchildren or the residents of a particular neighbourhood." *ibid*, para 10.

<sup>lxvi</sup> *ibid*.

<sup>lxvii</sup> Emphases added. *ibid*, para 14. These "settings and situations" are: in the family; in alternative care; in health care; in education and school; in play, recreation, sports and cultural activities; in the workplace; in situations of violence; in the development of prevention strategies; in immigration and asylum proceedings; in emergency situations; and in national and international settings.

<sup>lxviii</sup> Moreover, when the lands, territories and resources of indigenous peoples have been "confiscated, taken, occupied or damaged without their free, prior and informed consent", indigenous peoples are entitled to restitution or other appropriate redress (Article 28 UNDRIP).

<sup>lxix</sup> IACtHR, *Saramaka People v Suriname*, Ser C, no.172, para 134 (28 November 2007).

<sup>lxx</sup> CERD, 'General Recommendation No 23: Indigenous Peoples', (1997) UN Doc CERD/C/51/misc13/rev4, para 4(d).

<sup>lxxi</sup> See, eg, CCPR, 'Concluding observations: Nicaragua', (2008) UN Doc CCPR/C/NIC/CO/3 para 21; CESCR, 'Concluding observations: Ecuador', (2004) UN Doc E/C.12/1/Add.100 para 12.

<sup>lxxii</sup> International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests, 'Charter of the Indigenous and Tribal Peoples of the Tropical Forests' art. 21.

<sup>lxxiii</sup> CRC Committee, 'General Comment No. 12' (n 60) para 59.

<sup>lxxiv</sup> *ibid*, para 102.

<sup>lxxv</sup> *ibid*, para 103.

<sup>lxxvi</sup> See, eg, IACtHR, *Saramaka v Suriname*, Ser C, no. 172 (28 November 2007); IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*, Ser C, no 245 (27 June 2012); UN General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (2011), UN Doc. A/66/288, paras 77-91, (on the duty to consult); Desmet (n i) 314-317.

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<sup>lxxvii</sup> See, eg, S Bessell and T Gal, 'Forming Partnerships: The Human Rights of Children in Need of Care and Protection' [2009] 17 *The International Journal of Children's Rights* 283, 290; Desmet (n i) 600-607.

<sup>lxxviii</sup> See, eg, R A Hart, *Children's Participation: From Tokenism to Citizenship* (UNICEF International Child Development Centre 1992).